

PUBLIC

BEFORE THE SURFACE TRANSPORTATION BOARD

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Docket No. EP 334 (Sub-No. 8A)

Joint Petition for Exemption of Arbitration Rule  
from Application of 49 U.S.C. § 10706 and Motion to Dismiss

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**Motion for Leave to File a Surreply  
by the Railway Supply Institute**

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Dated: May 6, 2024

Pursuant to 49 C.F.R. § 1104.13(c) and the Board’s precedent favoring a liberal construction of its rules to secure a just determination of the issues presented, the Railway Supply Institute (RSI) respectfully requests leave to file the attached surreply in this proceeding. This request is necessary to address new arguments and evidence presented by the Association of American Railroads (“AAR”) and TTX, Inc. (“TTX”) in their replies, and to ensure that the Board has a complete and accurate record upon which to base its decision on RSI’s petition in this proceeding (the Petition).

**I. Legal standard for granting leave to file a surreply.**

Although the Board’s rules generally prohibit a reply to a reply (49 C.F.R. § 1104.13(c)), the Board has consistently construed its rules liberally to allow a party to file a surreply when it will contribute to the just determination of the issues presented, does not prejudice any party, and will not unduly prolong the proceeding. 49 C.F.R. § 1100.3 (stating that the Board’s rules “will be construed liberally to secure just . . . determination of the issues presented”); *R.R. Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA*, AB-556 (Sub-No. 2X), slip op. at 1 (STB served July 30, 2003); *Reading Blue Mountain & N. R.R.—Lease & Operation Exemption—Norfolk S. Ry.*, FD 34048, slip op. at 1 n.2 (STB served Aug. 1, 2001). The Board has routinely found good cause to allow a surreply if it will complete the record, clarify arguments, or allow a party to respond to new arguments it could not have anticipated. *E.g., Canadian Nat’l Ry.—Control—EJ&E W. Co.*, FD 35087, slip op. at 4 (STB served Apr. 26, 2017) (granting a reply in the interest of a more complete record); *BNSF Ry.—Discontinuance of Trackage Rights Exemption—In Peoria & Tazewell Counties, Ill.*, AB 6 (Sub-No. 470X), slip op. at 1 (STB served June 4, 2010) (granting a reply that would provide a more complete record and clarify the arguments); *R.R. Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA*, AB-556 (Sub-No. 2X), slip op. at 1 (STB served July 30, 2003)

(granting a reply to complete the record); *SF&L Railway, Inc.—Acquisition & Operation Exemption—Toledo, Peoria & W. Ry.*, FD 33996, slip op. at 2 (STB served Feb. 1, 2002) (granting a reply to allow a response to new arguments); *Reading Blue Mountain & N. R.R.—Lease & Operation Exemption—Norfolk S. Ry.*, FD 34048, slip op. at 1 n.2 (STB served Aug. 1, 2001) (granting a reply that address new factual issues because it is in the interest of developing a complete record); *Cross Oil Refining & Marketing, Inc. v. Union Pac. R.R.*, FD 33582, slip op. at 1 (STB served Oct. 27, 1998) (granting a reply to respond to a new assertion).

## **II. RSI’s surreply will assist the Board in the just determination of whether to reopen this proceeding.**

The surreply provides important analysis and information that will assist the Board in deciding whether to grant the Petition. As described further in this Section II, the surreply clarifies key aspects of the Petition that AAR and TTX misapprehend. It also provides a more complete record necessary to accurately evaluate several of AAR’s and TTX’s contentions. Additionally, it responds to new data and information provided by AAR and TTX.

### **A. The impending boxcar shortage.**

RSI’s surreply will address AAR’s and TTX’s contention that there is no impending boxcar shortage<sup>1</sup> by providing a more complete record and responding to data submitted by AAR and TTX. Specifically, AAR and TTX make several contentions about past boxcar additions, using UMLER data not directly available to RSI.<sup>2</sup> To provide a more complete record, RSI’s surreply explains that the circumstances surrounding those additions, which AAR and TTX ignore, no longer exist. AAR and TTX also contend that boxcars “in storage” data and

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<sup>1</sup> AAR and TTX call the upcoming retirement of 22% of the boxcar fleet before 2030, due to reaching their regulatory life limitation, a “boxcar cliff.”

<sup>2</sup> AAR Reply 6-7; TTX Reply 7-10.

anticipated increases in the proportion of high-capacity boxcars indicate that the anticipated shortage will be less severe.<sup>3</sup> RSI's surreply provides a more complete record on these points by explaining the shortfalls of using "in storage" data as indicative of actual railcar supply and the challenges of using the additional capacity of a high-capacity boxcar. Additionally, RSI provides additional information to rebut TTX's contention that past reductions in boxcar demand indicate future demand reductions.<sup>4</sup>

**B. AAR's misapprehension of the Petition and problems with the Arbitration Rule.**

AAR's reply inaccurately represents the Petition and the problems with the Arbitration Rule. RSI's surreply will clarify that RSI seeks a level playing field for negotiating car hire, not a prescription or guaranteed revenue, contrary to AAR's suggestions. The surreply will also address AAR's inaccurate assessment of the Arbitration Rule's impact on negotiated rates, misinterpretation of the application and economic impact of default rates, and misconstruction of how the Arbitration Rule's dispute resolution mechanisms are not capable of producing the market-based car-hire results that the ICC intended.

**C. New arguments and evidence.**

RSI's surreply responds to new arguments and evidence by AAR and TTX. It addresses AAR's contention that railcar lessors could choose to avoid the Arbitration Rule,<sup>5</sup> which is completely impractical on its face. It also responds to TTX's submission of new information about how it prices its boxcars, including TTX's inaccurate claims about how it faces different pricing considerations than boxcar lessors.

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<sup>3</sup> AAR Reply 7-8; TTX Reply 9-11.

<sup>4</sup> See TTX Reply 11-12.

<sup>5</sup> AAR Reply 2.

**III. RSI's surreply will not prejudice any party or unduly prolong this proceeding.**

Accepting RSI's surreply will not prejudice AAR or TTX nor will it unduly prolong this proceeding. The surreply does not introduce new issues. Instead, it responds to arguments and evidence that AAR and TTX introduced in their replies and corrects misapprehensions about RSI's positions. Additionally, the surreply will not cause any undue delay because there is no further procedural schedule for this proceeding. Also, even if any delay resulted from the surreply, it would prejudice RSI, since it is seeking reopening of this proceeding and its members are harmed by the continued approval of the Arbitration Rule.

**IV. Conclusion.**

For the foregoing reasons, RSI respectfully requests that the Board grant this motion for leave to file a surreply. The surreply will ensure that the Board has a full and accurate record, will not prejudice other parties, and will not unduly delay the proceeding.

Respectfully submitted,

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Dated: May 6, 2024

Attachment

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Joint Petition for Exemption of Arbitration Rule  
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**Surreply of  
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The Railway Supply Institute (RSI) submits this surreply<sup>1</sup> to address several inaccuracies and mischaracterizations in the replies of the Association of American Railroads (AAR) and TTX, Inc. (TTX).

First, claims that RSI's Petition seeks to artificially inflate rates<sup>2</sup> are misplaced. The Petition merely asks the Board to explore ways to level the playing field in car-hire negotiations and thereby reduce the suppressive impact of the Arbitration Rule on car-hire rates. It does not seek rate prescriptions or guaranteed income levels, but rather adjustments to the current negotiation-based structure that would promote an adequate, but not excessive, supply of boxcars.

Second, claims that there will not be a boxcar shortage<sup>3</sup> are based on several fundamental inaccuracies. Regardless, AAR and TTX ignore that even without a boxcar shortage, the Arbitration shortage, the Arbitration Rule is not in the public interest because it will continue to facilitate TTX's dominance of the boxcar market.

Third, AAR misconstrues several fundamental aspects of the Petition. It ignores the real issues with the Arbitration Rule, such as how it influences negotiated rates, and instead points to irrelevant facts and ignores facts that are inconsistent with its position. It suggests that no issue with the Arbitration Rule exists because railcar lessors can choose not to participate in it, yet ignores that this would be highly impractical and harm both railroads and shippers.

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<sup>1</sup> This surreply contains highly confidential material, subject to the protective order in this proceeding. This material is enclosed in double braces (e.g., {{...}}).

<sup>2</sup> *E.g.*, AAR Reply 2.

<sup>3</sup> AAR and TTX call the upcoming retirement of 22% of the boxcar fleet before 2030, due to reaching their regulatory life limitation, a "boxcar cliff."

Fourth, TTX's claims that its elevated boxcar pricing is justified are based on purported differences between TTX's and railcar lessors' pricing considerations that do not exist. Instead, TTX's description of its pricing along with its consistent and large investment in boxcars underscores that the Arbitration Rule, which does not apply to TTX, suppresses car-hire rates well below what is necessary to promote an adequate boxcar fleet.

**I. A severe boxcar shortage is imminent.**

**A. Recent boxcar investment was made under unique past circumstances and will not continue.**

AAR and TTX contend that recent investment by railcar lessors in boxcars demonstrates that lessors have adequate incentives to continue investing in new boxcars and that boxcars will continue to be replaced at an adequate rate.<sup>4</sup> But the circumstances underlying those investments were unique and no longer exist. In fact, there are no boxcar orders on the books this year.<sup>5</sup>

According to AAR and TTX, private lessors have added approximately 7,700 new boxcars between 2016 and 2023.<sup>6</sup> Yet the vast majority of these cars—{{█}}% or {{█}} cars—were added beginning in 2021<sup>7</sup> as railcar investors benefitted from a perfect storm of exceptionally low capital costs and low car acquisition costs.

The attached verified statement of Paul F. Titterton, Executive Vice President and President, Rail North America at GATX Corporation, outlines the historically favorable economic conditions that encouraged railcar lessors to invest in new boxcars after 2020 and how these conditions no longer exist and are unlikely to exist in the foreseeable future. In 2020 and

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<sup>4</sup> AAR Reply 6, Saat V.S. ¶ 16; TTX Reply 7-9.

<sup>5</sup> Ry. Supply Inst., ARCI 2024 – 1<sup>st</sup> Quarter Reporting Statistics, Report of Orders, Deliveries and Backlog (Mar. 31, 2024).

<sup>6</sup> TTX Reply 7.

<sup>7</sup> AAR Reply, Saat V.S. ¶ 14.

2021, interest rates were at historic lows and the purchase price of new boxcars was significantly lower than pre-COVID levels.<sup>8</sup> These conditions prompted GATX to order {{[REDACTED]}} 60-foot high-capacity boxcars in 2020 and 2021 at a weighted-average purchase price of \${{[REDACTED]}}, with a weighted average GATX funding cost of {{[REDACTED]}}%.<sup>9</sup> By 2024, the economic landscape changed drastically. The spot price for the same boxcar type had increased to \${{[REDACTED]}}, and GATX's funding cost more than {{[REDACTED]}}, reaching approximately {{[REDACTED]}}%.<sup>10</sup> Assuming a 40-year amortization schedule, \${{[REDACTED]}} in monthly maintenance expense per car, and 100% debt-funding for a boxcar, this shift in economic conditions from 2020-21 to 2024 caused the monthly breakeven point for purchase of this type boxcar to surge from \${{[REDACTED]}} to \${{[REDACTED]}}.<sup>11</sup> Since a lessor like GATX can only expect to earn between \${{[REDACTED]}} and \${{[REDACTED]}} in car hire per month for this boxcar type, the exceptionally favorable economic conditions that existed in 2020 and 2021, and generally carried forward into 2022, justified boxcar orders at the time<sup>12</sup> and, due to lags between orders and deliveries, explains a large share of the boxcar deliveries from 2021-2024. In contrast, if the 2024 economic conditions had existed in 2020 and 2021, boxcar orders during that period and boxcar investment by railcar lessors would not have been economically viable,<sup>13</sup> and only TTX, which earns car-hire rates far in excess of car-hire rates that railcar lessors can expect to earn, would have been able to afford to invest in new boxcars.

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<sup>8</sup> Titterton V.S. ¶ 6.

<sup>9</sup> *Id.* ¶¶ 5, 7.

<sup>10</sup> *Id.* ¶ 7.

<sup>11</sup> *Id.* ¶ 8.

<sup>12</sup> *See id.* ¶ 9.

<sup>13</sup> *See id.*

Further, boxcar additions from 2016-2020 by railcar lessors had nothing to do with whether there were adequate incentives at the time to invest in boxcars. Leading into this period, railcar lessors had placed large orders of other railcar types in anticipation of a sustained crude-by-rail boom.<sup>14</sup> Crude-by-rail shipments waned by 2016, however, eliminating the need for many of energy-related car orders.<sup>15</sup> So, instead of taking delivery of energy-related car orders for which there was no demand, railcar lessors attempted to reduce their potential losses by converting many of the orders to other car types that had a greater likelihood of use, including boxcars.<sup>16</sup> As Mr. Titterton explains, GATX owns nearly {{[REDACTED]}}<sup>17</sup> of the approximately {{[REDACTED]}}<sup>18</sup> lessor-owned boxcars that were added to the North American fleet from 2016-2020, all of which were added under these circumstances.<sup>19</sup> Boxcar lessors are unlikely to add boxcars under these circumstances again because these additions were merely intended to reduce losses arising from excessive orders of other car types, and were not expected to earn a positive return on investment.

Additionally, historical boxcar additions by Class I railroads beginning in 2022 do not suggest adequate current and future incentives to invest in the North American boxcar fleet. First, they were influenced by the historically favorable economic conditions that existed in 2020 and carried into 2022. Second, these investments followed nearly a decade of almost no additions

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<sup>14</sup> See *id.* ¶ 4.

<sup>15</sup> See *id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> TTX states that more than 7,700 new boxcars were added by railcar leasing companies between 2016 and 2023. TTX Reply 7. According to AAR, {{[REDACTED]}} of these were added since the beginning of 2021. AAR Reply, Saat V.S. ¶ 14.

<sup>19</sup> Titterton V.S. ¶ 4.

by Class I railroads.<sup>20</sup> Third, they reflect that Class I railroads have an incentive to add railcars for use on intraline movements. Class I railroads operate vast networks that involve a substantial amount of intraline boxcar moves. By acquiring its own boxcars for these movements, a Class I carrier gains more control over the boxcar supply for its intraline traffic, which can lead to efficiency gains and may outweigh some of the costs of boxcar acquisitions. But, because railcars acquired under this strategy would not be available across the entire rail network, these acquisitions have a limited impact on overall boxcar supply.

At bottom, railcar lessors and Class I railroads have little, if any, incentive to continue adding new boxcars for use in pooled or interline service, especially not at recent price and interest rate levels. Due to its ability to charge elevated car-hire rates, only TTX will continue to have an economic incentive to invest in new boxcars.

**B. Boxcars “in storage” are not indicative of boxcar supply.**

AAR contends that the number of boxcars “in storage” suggests enough boxcars will continue to be available.<sup>21</sup> But AAR fails to mention that a large portion of these cars are unusable. It also ignores that fleets require a substantial percentage of railcars “in storage” to appropriately accommodate rail demand, and using boxcars “in storage” to address the coming boxcar retirements will, at best, eliminate necessary rail-network resiliency for boxcar traffic.

Even TTX concedes that approximately 7,000 of the boxcars in storage—38% of the total that AAR reports as “in storage”<sup>22</sup>—are functionally obsolete.<sup>23</sup> The fact of the matter is that

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<sup>20</sup> TTX Reply 8 fig. 4.

<sup>21</sup> AAR Reply 8, Saat V.S. 4.

<sup>22</sup> AAR Reply, Saat V.S. ¶ 7.

<sup>23</sup> TTX explains that these cars were not put into service even during the most recent peak usage, when boxcar shortages were a common issue. TTX Reply 9-10.

AAR classifies a car as “in storage” based solely on whether the car moved loaded in the past 60 days and had a subsequent empty movement. For an aging boxcar fleet that earns car hire at levels that are insufficient to encourage investment, many cars “sitting in storage” could be awaiting repairs or may need retrofits or overhauls for continued use. Also, cars in use at shipper facilities or for short shuttle moves that do not pass a wayside detector are deemed “in storage” under AAR’s measure even though they actually are in use.

Additionally, a large number of boxcars “in storage” are needed to avoid supply disruptions due to normal fluctuations in demand and railroad performance. Since the mid 2010s, transit-time performance among rail carriers has been highly variable. This has increased the need for railcars since more railcars are necessary to maintain the flow of goods when the rail network slows. If boxcars “in storage” are available to mitigate the threatening boxcar shortage, as AAR suggests, it will jeopardize the resilience of the rail network for boxcar traffic.

In sum, substantially fewer boxcars are available than AAR claims. Also, as boxcars continue to reach the end of their service life in large numbers and favorable economic conditions for investment become a distant memory, current levels of boxcars “in storage” will be woefully inadequate to satisfy boxcar demand under normal rail network performance.

**C. Shifts in boxcar capacity will not avert the coming boxcar shortage.**

In tacit acknowledgment of a potential boxcar shortage, AAR and TTX claim that the greater capacity of new boxcars will make up for retired boxcars.<sup>24</sup> But they omit the fact that only a small portion of this capacity increase will be usable for many shippers.

First, many shipper facilities are not designed to use the higher-capacity boxcars. The vast majority of new boxcars are 60-foot high-roof boxcars, whereas traditional boxcars are 50-

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<sup>24</sup> AAR Reply 7-8; TTX Reply 10-11.

foot standard-height cars. A common design for shipper facilities that use boxcars is to have a siding next to the building so that the boxcars can be loaded and unloaded directly to or from the building. Because 50-foot cars historically were the standard car length, many rail-customer facilities that use boxcars are built with door intervals that cannot accommodate 60-foot boxcars without losing the use of every other door. Using 60-foot cars for added capacity thus would be impractical at these facilities without reworking both the exterior of the facility as well as the interior layout of the facility. Additionally, track at many rail-customer facilities that use boxcars was not built to accommodate 60-foot cars and thus may not provide sufficient lateral clearance for these longer cars or enough space for storage.

The added roof height of high-capacity railcars also limits their utility. Many rail-customer facilities that receive boxcars were built to accommodate standard-height cars. To use high-capacity cars at these facilities would require changes to overhang and door clearances.

Second, the extra space within high-capacity cars is not useable by many shippers. A large part of this extra space arises from a heightened roof, and for certain boxcar commodities, like paper rolls, using this space could cause the car to exceed its maximum center of gravity.<sup>25</sup> In contrast, standard-height cars have the same maximum center of gravity as high-roof cars, but because of their lower roofline, there is no practical possibility of exceeding their center of gravity.<sup>26</sup>

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<sup>25</sup> AAR, Closed Car Loading Guide ¶¶ 3.5.2 (2019), <https://www.aar.com/standards/documentServer.php?document=DPLS-content-locked%2FRollPaper.20191216.pdf>.

<sup>26</sup> *Id.* ¶¶ 3.5.1-.2.

Third, many shippers have built their shipment sizes around the traditional 50-foot standard car. It is impractical for many of these shippers to rearrange their long-held practices to make full use of the heightened capacity of a 60-foot high-roof car.

Ultimately, much of the added capacity from new high-capacity boxcars is unused. The reduced loading efficiency of high-capacity cars combined with their impracticality for many shippers demonstrates that the additional lading capacity of new high-capacity boxcars will not materially mitigate the reduction in the total number of boxcars to forestall the looming boxcar shortage.

**D. Boxcar demand is predicted to stay level, not fall.**

Although AAR and TTX contend that boxcar demand is down, they focus on past declines in demand. This backwards-looking approach does not anticipate the future demand for boxcars and is inconsistent with TTX's recent prediction that "[t]otal North American boxcar loadings should stay flat."<sup>27</sup>

In fact, the Arbitration Rule poses a significant threat to continued boxcar demand. While it generates car hire below rates that reflect boxcar demand, this has led to an imminent boxcar shortage, which discourages shippers from using boxcar transportation.<sup>28</sup> In contrast, a stable, adequately-sized fleet would provide shippers with confidence to rely on boxcar transportation and make boxcar transportation more competitive with other modes. There is no reason to

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<sup>27</sup> Pet. App. E at 13.

<sup>28</sup> AAR's attempt to downplay current concerns about the boxcar fleet as no different than those that existed in 1983 (AAR Reply 5) ignores that, in the decade before 1983, nearly 100,000 boxcars had been added to the North American boxcar fleet and were decades away from retirement. Petition, Powers V.S. 41-42. Either way, those concerns were prescient insofar as they predicted that a shift to an approach that relied on bilateral agreements despite the absence of supply and demand pricing signals in the car-hire market would ultimately result in an overcorrection that would discourage investment once boxcar levels declined.

believe AAR's contention that an adequate fleet requires artificially high car hire, and the Petition does not seek any Board action that would impose such a rate (or any rate).<sup>29</sup>

## **II. AAR misapprehends the Petition and the problems with the Arbitration Rule.**

The Petition seeks a level playing field for negotiating boxcar rates. But AAR ignores this and other key elements of the Petition, incorrectly recasting it as a call for prescription and misconstruing RSI's positions.

First, AAR ignores that the problem with the Arbitration Rule is that it places railcar owners at a disadvantage when negotiating rates, not that it promotes negotiated rates.<sup>30</sup> The ICC's goal in deprescribing car hire and approving the Arbitration Rule was to promote an adequate supply of railcars.<sup>31</sup> It believed that relying on rate agreements would achieve this goal because they "should" produce car-hire rates reflecting an effective market. *Car Hire Regulation*, No. EP 334 (Sub-No. 6) et al., 1992 ICC LEXIS 34, at \*15 (ICC Feb. 18, 1992). But, as the Petition explains, the Arbitration Rule pressures car owners to agree to below-market rates. It sets default rates at the lowest negotiated rate, which provides little incentive for a railcar user to negotiate unless it believes that the railcar owner will pursue arbitration. But since boxcar use is typically dispersed among multiple users, with the largest user of a given boxcar typically accounting for less than half of that boxcar's overall use, potential arbitration costs make

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<sup>29</sup> If the Board were to condition its approval of the Arbitration Rule, railroads would not be required to adopt the condition. Instead, they could continue imposing the current Arbitration Rule without antitrust immunity.

<sup>30</sup> AAR Reply 8-9.

<sup>31</sup> The impetus for deprescription and the Arbitration Rule was that the ICC's prescription approach was producing rates that were inconsistent with the supply and demand for railcars, resulting in significant freight car surpluses. *Car Hire Regulation*, No. EP 334 (Sub-No. 6) et al., 1992 ICC LEXIS 34, at \*3 (ICC Feb. 18, 1992).

arbitration impractical with all but the largest users of a railcar.<sup>32</sup> Also, even where arbitration is practical, it encourages railcar owners to agree to car-hire rates that are lower than an expected arbitration award to avoid arbitration costs. In fact, the absence of any arbitrations over the last decade suggests that arbitration is encouraging such below-market settlements, which in turn become evidence of market rates for future arbitrations, creating downward pressure on car-hire rates.

Second, AAR misrepresents the small number of boxcars that move only under default rates as indicating that default rates affect few cars.<sup>33</sup> This ignores the many boxcars that move under a mix of negotiated rates and default rates. In fact, 27% of paid hours and 22% of paid miles fall under default rates, which is economically important<sup>34</sup> and confirms that, as explained above, the Arbitration Rule encourages railcar owners to accept default rates for a large portion of car use.

Third, there is strong evidence demonstrating that the ICC's belief that an arbitrator would select a rate offer that most closely approximates a market rate was misplaced.<sup>35</sup> Specifically, AAR ignores that the car-hire market lacks supply and demand pricing signals present in a normal market. Thus, no arbitrator could reliably select rate offers that reflect a market rate. Further, AAR's assertion that RSI must provide evidence of arbitration awards in support of its position<sup>36</sup> creates an impossible burden because RSI would not have access to the confidential rate offers necessary to evaluate the arbitrator's decision, even if it could be

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<sup>32</sup> Petition 11-12.

<sup>33</sup> AAR Reply 10-11.

<sup>34</sup> Petition, Powers V.S. 31-32.

<sup>35</sup> See AAR Reply 12-13.

<sup>36</sup> AAR Reply 12-13 (contending that this ICC belief was not misplaced).

evaluated given the lack of supply and demand pricing signals. Regardless, the broader issues with arbitration under the Arbitration Rule are that it is a practical option in fewer situations than the ICC intended and it pressures car owners to accept below-market negotiated rates to avoid the cost of arbitration.<sup>37</sup>

Fourth, AAR's contention that default rates are set at levels sufficient to encourage an adequate fleet size and not indicative of gaming<sup>38</sup> ignores that default rates are set at levels well below the normal range of negotiated rates. Assuming for the sake of argument that negotiated rates accurately reflect supply and demand factors, default rates that appropriately encourage an adequate fleet size should not be substantially lower than the distribution of negotiated rates actually paid. But data shows that default rates are far below this distribution,<sup>39</sup> confirming that they do not reflect the need for boxcars.

Fifth, AAR ignores RSI's argument that, regardless of whether a boxcar shortage materializes (and it will), the Arbitration Rule has and will continue to promote TTX's dominance of the boxcar market. AAR acknowledges that TTX alone added nearly {{[REDACTED]}} of all boxcars since 2021.<sup>40</sup> Also, Figure 4 of TTX's Reply shows that TTX alone added about half of all boxcars since 2020.<sup>41</sup> Given the changes in conditions surrounding lessors' incentives discussed above, TTX's share of new investment is likely to rise in the coming years. Neither TTX nor AAR have suggested that controlling such a high share of the boxcar market is necessary for boxcar pooling, and TTX has shown that it can provide the benefits of boxcar

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<sup>37</sup> Petition 12.

<sup>38</sup> AAR Reply 13.

<sup>39</sup> Petition, Powers V.S. 24-25.

<sup>40</sup> AAR Reply, Saat V.S. ¶ 15.

<sup>41</sup> TTX Reply 8 fig. 4.

pooling through a fleet of non-TTX boxcars. Further, facilitating continued expansion of TTX's large market share of boxcars is not in the public interest. It forces railcar lessors to invest in TTX's chosen standardized car types for fear that investments in other car types will become obsolete. Similarly, it forces shippers to accept boxcar types that are inefficient for their movements.

### **III. Boxcar lessors cannot avoid the Code of Car Hire.**

AAR's suggestion that boxcar lessors could avoid the Arbitration Rule by not participating in the Code of Car Hire<sup>42</sup> is neither practical nor constructive. For roughly the last half-century, the Code of Car Hire has governed and shaped the boxcar market. The Code embraces and promotes the per diem structure, which is characteristic of boxcar leases. Without the Code and associated systems supporting railcar use under the Code, each railcar lessor would have to attempt to transition its lessees to a fixed-rate leasing structure. This transition would make use of lessor-owned boxcars significantly less economical for many boxcar users, paving the way for TTX to take over the boxcar market.

While lessors might prefer a boxcar leasing market with a larger share of fixed-rate fixed-term leases, they do not have the market power to pursue this, which is why the share of boxcars operating under fixed-rate leases is much smaller than other railcar types. Also, moving to fixed-rate leases would significantly undermine the competitiveness of boxcar transportation. Fixed-rate leases would shift the financial risk of boxcar investments to railroad lessees, many of which are Class II and III carriers. Moreover, leased boxcars likely still would move under the Code of Car Hire to enable railroads to share the boxcar costs involved in interline movements and leverage the efficiencies of boxcar pooling.

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<sup>42</sup> *E.g.*, AAR Reply 2, 10

#### IV. TTX's pricing demonstrates that boxcar car-hire rates are excessively low.

TTX contends that its boxcar pricing is an inaccurate measure of whether car-hire rates on railroad-marked cars are adequate.<sup>43</sup> But the three reasons it provides in support of this contention confirm that current car-hire rates under the Code of Car Hire are excessively low.

First, TTX's contention that its boxcar pricing is elevated because it is cost-based<sup>44</sup> underscores the essence of RSI's Petition, that current car-hire rates for boxcars are inadequate to support investment. Also, when viewed against TTX's consistent and dominant investment in boxcars since 2000, this pricing indicates that boxcar demand is sufficient to support car-hire rates well above levels produced under the Arbitration Rule.

Second, TTX claims that its rates are elevated because it does not have any guarantee that it will earn usage charges on all of its cars at all times since railroads can take these cars "off the clock" if they do not need the cars.<sup>45</sup> But railcar lessors also are not guaranteed to earn usage charges at all times. In fact, boxcars operating under the Code of Car Hire are subject to mechanisms that effectively suspend or curtail car hire when a foreign road does not need the boxcar. Under 49 C.F.R. § 1039.14(c)(1)(ii), a railroad that has unneeded railcars can store the cars and reclaim car hire after 72 hours. Also, 49 C.F.R. § 1039.14(c)(i) allows a railroad to assess an empty mileage charge on foreign boxcars moving on its line at another carrier's request. These regulatory mechanisms eliminate any guarantee that a railcar owner will earn car hire from a railroad that does not need the owner's boxcars.

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<sup>43</sup> TTX Reply 12.

<sup>44</sup> *Id.* at 13-14.

<sup>45</sup> *Id.* at 13.

Third, TTX claims that its usage charges are the only source of revenue for its boxcars, whereas railcar lessors can earn revenue through fixed-payment leases that are not dependent on usage.<sup>46</sup> This ignores the commercial reality that the vast majority of boxcar leases are per diem leases, not fixed-payment leases. Not only do railcar lessors not have the market power to convert to fixed-payment leases,<sup>47</sup> but also changing this structure would have harmful repercussions for railroads and shippers. The fixed-payment structure shifts the financial risk of a boxcar from lessors to railroads, eliminating the option for smaller railroads to pay for boxcars only to the extent they need them. A fixed-payment structure also impairs boxcar utilization because fixed-payment cars typically would be dedicated to a single shipper or a single carrier. Further, when railcar lessors choose to earn revenue through fixed-payment leases, they forego usage charges; fixed payments are therefore a substitute for usage charges, rather than an additional source of revenue.

## **V. Conclusion**

For the reasons above and in the Petition, the Board should reopen this proceeding, review the Arbitration Rule, and grant such other relief as it may deem appropriate.

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<sup>46</sup> *Id.* at 14.

<sup>47</sup> If lessors could shift to fixed-rate leases, they likely would have already done so because it would reduce their financial risk.

Respectfully submitted,

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*Counsel for the Railway Supply Institute*

Dated: May 6, 2024

BEFORE THE SURFACE TRANSPORTATION BOARD

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Docket No. EP 334 (Sub-No. 8A)

JOINT PETITION FOR EXEMPTION OF ARBITRATION RULE  
FROM APPLICATION OF 49 U.S.C. § 10706 AND MOTION TO DISMISS

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**Verified Statement<sup>1</sup> of Paul F. Titterton of  
GATX Corporation**

1. I, Paul F. Titterton, submit this verified statement in support of the Reply of the Railway Supply Institute in this proceeding.

2. I am the Executive Vice President and President, Rail North America at GATX Corporation (GATX). As part of my role, I have oversight of P&L activity for GATX's North American railroad rolling stock fleet, including GATX's boxcars. I am a voting member of GATX's investment committee, which is responsible for approving all significant acquisitions and dispositions of railroad rolling stock, including boxcars.

3. GATX is a leading global provider of railroad rolling stock leasing. Its diverse portfolio of railcars for lease includes one of the largest lessor-owned fleets of boxcars in North America.

4. GATX owns nearly {{[REDACTED]}} of the boxcars that were added to the North American boxcar fleet during 2016-2020. Of those boxcars, approximately {{[REDACTED]}} were originally ordered by GATX and the balance of {{[REDACTED]}} cars were originally ordered by a lessor which has since exited the railcar leasing market and whose fleet was subsequently acquired by GATX. GATX's aforementioned {{[REDACTED]}} boxcars were conversions of pre-existing build orders for other railcar types that were made during the crude-by-rail boom during the middle part of

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<sup>1</sup> This verified statement contains highly confidential material, which is enclosed in double braces (e.g., {{...}}). This material is subject to the protective order in this proceeding.

the 2010s, and GATX understands that the other lessor's boxcars which GATX subsequently acquired were ordered under similar circumstances. As the boom subsided, a large number of energy-related railcar orders remained in the pipeline to be built, but there was little, if any, demand for them. To reduce losses from taking delivery of unneeded energy-related railcars, GATX and other railcar lessors converted these orders to other car types that had a greater chance of being used, like boxcars.

5. From 2020 to 2021, GATX ordered {{[REDACTED]}} high-capacity 60-foot boxcars.

6. In 2020 and 2021, and extending into 2022, interest rates were at historical lows and the cost to purchase new boxcars had dropped substantially from pre-COVID levels.

7. At the time of GATX's 2020-21 boxcar orders, the weighted-average purchase price for the orders was \${{[REDACTED]}} per car and the weighted-average GATX funding cost was {{[REDACTED]}}%. In contrast, in 2024, the spot price of a new boxcar is approximately \${{[REDACTED]}} and GATX's funding cost is approximately {{[REDACTED]}}%.

8. Assuming that, on the margin, any investment in new boxcars is 100% debt-funded, the change between 2020-21 and today implies an increase in initial monthly interest cost from \${{[REDACTED]}} to \${{[REDACTED]}}, and an increase in total monthly debt service (assuming a 40-year amortization schedule) from \${{[REDACTED]}} to \${{[REDACTED]}}. Adding in a low estimate of \${{[REDACTED]}} for maintenance gets to an all-in breakeven monthly figure of \${{[REDACTED]}} during 2020-21 versus \${{[REDACTED]}} today.

9. Since car-hire rates available to lessors on high-capacity 60' boxcars generally produce revenues in a broad range between \${{[REDACTED]}} and \${{[REDACTED]}}, boxcar investment by private lessors was justifiable during the height of the COVID pandemic but is generally not justifiable today.

### **VERIFICATION**

I, Paul F. Titterton, verify under penalty of perjury that the foregoing is true and correct. Further,  
I certify that I am qualified and authorized to file this statement.

Executed on May 6, 2024

/s/ Paul F. Titterton

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Paul F. Titterton